IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78—687

THE LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and
THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

MEMORANDUM BRIEF OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

PETER H. SCHIFF
General Counsel
Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

RICHARD A. SOLOMON
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036

Attorneys for
THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondent*

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The Public Service Commission of the State of New York (New York) herewith opposes the petition for certiorari filed in this case by Louisiana Land and Exploration Company (LL&E) seeking review of the opinion of the Fifth Circuit Court of Appeals in Case No. 76-4380, issued on May 30, 1978, 574 F.2d 204 (Pet. App. 1a-9a) affirming Opinion Nos. 772 and 772-A of the Federal Power Commission (Pet. App. 13a-39a). Certiorari should be denied because the Commission

and court below reached clearly sound decisions on a unique factual issue which is not likely to be repeated in the future.

1. This case is an outgrowth of the "lease sale" device adopted by a number of natural gas producers in the late-1950's in an unsuccessful effort to evade price regulation under the Natural Gas Act, subsequent to this Court's decision in *Phillips Petroleum Corporation* v. *Wisconsin,* 347 U.S. 672 (1954), holding that producer sales were covered by the Act. The effort failed when this court held lease sales to be sales of natural gas (*United Gas Improvement Co.* v. *Continental Oil Co.,* 381 U.S. 392 (1965) and the Commission on remand subsequently concluded that lease sale arrangements were contrary to the public interest and would not be authorized. *See, Texas Eastern Transmission Corp.,* 44 F.P.C. 1079 (1970), affirmed on this point, *Public Service Commission of the State of New York* v. *Federal Power Commission,* 543 F.2d 757; 830 (1974 and 1975), *cert. denied sub nom., Sun Oil Co.* v. *Public Service Commission,* 424 U.S. 910 (1976).

The present case arose out of a 1960 lease sale of developed gas production acreage in the Bastian Bay area of Southern Louisiana to Tennessee Gas Transmission Company. The transaction, which was held to involve a jurisdictional sale in *Tennessee Gas Transmission Co.,* 30 F.P.C. 1477 (1963), affirmed, *Federal Power Commission* v. *Pan American Petroleum Corp.,* 381 U.S. 762 (1965), differed from the other lease sale proposals coming before the Commission in that LL&E, a lessor of some of the property being conveyed, exercised its contract rights to approve any lease assignment only upon the condition that the pipeline purchaser, Tennessee, agree to pay it a specified

amount per Mcf for its share of all gas produced from the field. This amount, 22.5 cents per Mcf until January 1, 1962 and 25.0 cents per Mcf thereafter (Pet. App. 15a) was significantly higher than the per Mcf revenues which would be secured by the producers at the then estimated reserve levels in the Bastian Bay Field (Pet. App. 18a).

To the best of our knowledge, this situation in which a lessor separately contracts with a pipeline for the revenues to be secured for its royalty interest in a lease and does so at an effective rate per Mcf higher both than that secured by the lessee producer and the level determined as just and reasonable by the Commission under the Natural Gas Act, is unique to the present transaction. It certainly was not typical of any significant number of gas sales transactions.

The Commission's determinations in Opinion No. 772 (Pet. App. 13a-27a) and Opinion No. 772-A (Pet. App. 28a-39a), that the lessor's actions in these circumstances constituted a "sale" within the meaning of *United Gas Improvement Co., supra,* and *Mobil Oil Corp.* v. *Federal Power Commission,* 463 F.2d 256 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 976 (1972) is in our opinion clearly correct as a matter of fact and law. To the very large extent, however, that the petition challenges the Commission's construction of the facts, as affirmed by the court of appeals, this is obviously not a matter for this Court's plenary review. *See, e.g., Mobil Oil Corp.* v. *Federal Power,* 417 U.S. 283, 307-310 (1974).

The basic legal question decided by the Court below—whether a separate arrangement between a royalty owner and a pipeline specifying the level of the payment to be made for the royalty interest in the gas on a basis different from that provided for in the pipeline's contract for the lessee's interest can be classified as a

"sale" within the meaning of the Natural Gas Act—is, we are convinced not subject to serious dispute. This Court's opinion in the *United Gas Improvement Co.* case, *supra,* makes clear that the economic realities rather than categorization under state law determines whether a transaction is a sale subject to the jurisdiction of the Commission. *See also, California* v. *LoVaca Gas Gathering Co.,* 379 U.S. 366 (1965). *Mobil Oil Corp.* v. *Federal Power Commission,* 463 F.2d 256 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 976 (1972) upon which petitioner places its principal reliance does not carve out an exception for royalty interests. For while the court of appeals in *Mobil* held that a royal contract does not constitute a sale of gas in interstate commerce where the lessor performs no significant role in the sale transaction, it made clear that the determinative issue was whether the "economic impact" of a transaction between the royalty holder and the purchasing pipeline constituted, "the equivalent of conventional sales of natural gas." It stressed that in the standard royalty situation, to which the Commission's order under review was directed, the lessor normally has

> . . . no knowledge when the lease is executed of the ultimate destination of any gas that might be discovered, no knowledge whether the gas, if discovered, will be either to an interstate pipeline or to any other customer that will move it across state lines . . . [and] typically has no control over any incident of such sale either as to the quantity to be sold, the price to be paid, the identity of the purchaser. . . .
> (*Mobile Oil Corp.* v. *Federal Power Commission, Supra,* 463 F.2d at 262.)

A determination that "an economic interest in the proceeds of a sale, unaccompanied by authority to determine the incidents of the sale, does not make one a seller" (*Ibid.*), clearly does not cover this case. On the contrary, the Court's action with respect to the so-called Denman "R" line (463 F.2d at 266), clearly indicates its belief that circumstances might exist where a royalty owner's actions could be construed as constituting a sale under the Natural Gas Act.[1]

2. The present case has no general significance in the administration of the Natural Gas Act, or the newly enacted Natural Gas Policy Act of 1978, Public Law No. 95-621, H.R. 5289, signed by the President November 9, 1978. Not only is the factual situation presented virtually unique in the forty year history of the Natural Gas Act, but the chances for it arising in the future are virtually nil. The Federal Power Commission has found that lease sales of the type which led to petitioners' determination to contract directly with the pipeline purchaser are contrary to the public interest and none have been submitted for certification in the last decade. In addition, the recent passage of the Natural Gas Policy Act of 1978, by prescribing legislatively the maximum rates at which all new sales—both interstate and intrastate—can be made, and providing for ultimate deregulation of all new sales of natural gas, would appear to have eliminated the underlying cause for controversy or disagreement between lessor and lessee as to the appropriate rate and terms for sales of any gas produced from the lease which could lead a

[1] As the Commission made clear (Pet. App. 19a), the subsequent *Denman* case at the Commission (*Denman* v. *Huber Corp.,* 49 F.P.C. 1443 (1973)), relied upon by petitioner, is far removed in fact from the present case since the lessee in the Denman case alone selected the purchaser and agreed with him on contract terms governing payment for all of the gas. This is quite different from the situation here where the petitioner not only negotiated directly with the pipeline purchaser but arranged for a more favorable deal for its royalty interest than the producers secured.

lessor to seek a separate arrangement with the purchaser of the gas.

It would be premature, in view of the newness and complexity of the new Act, to conclude that no significant issue as to the relationship of royalty contracts or actions by lessors independent of the lessees can or will develop in the future—though if one does arise there is no reason to believe it will resemble the present case. But certainly there is nothing to indicate that review of the lower court decision here will have any general significance which could warrant granting the writ—even if the Court were to have greater doubts as to the correctness of the decision below than we believe is conceivably warranted. Accordingly, New York believes the petition for a writ of the certiorari must be denied.

Respectfully submitted,

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

Peter H. Schiff, General Counsel
The Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

Richard A. Solomon
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036

Its Attorneys

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